Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991	)	CG Docket No. 02-278
	)	
	)	
Rules and Regulations Implementing the Junk Fax Prevention Act of 2005	)	
	)	

Anderson + Wanca's Comments on
Petition for Declaratory Ruling of Insights Association and AAPOR

The law firm of Anderson + Wanca ("A+W") submits these comments in opposition to the Petition for Declaratory Ruling filed by Insights Association, Inc. and the American Association for Public Opinion Research ("AAPOR").[1] The Consumer & Governmental Affairs Bureau sought comments on the Insights Petition on May 23, 2018.[2]

A+W has a nationwide practice representing plaintiffs in private actions for violations of the Telephone Consumer Protection Act of 1991 ("TCPA"), particularly the Commission's fax-advertising rules.[3] A+W has no case pending against the Insights Association or (to the best of A+W's knowledge) any of its members, but A+W was plaintiff's counsel in three of the cases discussed in the Insights Petition: *Physicians Healthsource, Inc. v. Boehringer Ingelheim Pharms., Inc.*, 847 F.3d 92 (2d Cir. 2017), *Sandusky Wellness Ctr., LLC v. Medco Health Sols.,*

[1] *Petition for Declaratory Ruling*, CG Docket No. 02-278 (Oct. 30, 2017) ("Insights Pet." or "Pet.").

[2] *Consumer & Governmental Affairs Bureau Seeks Comment on Insights Assoc., Inc. & Am. Assoc. for Public Opinion Research Petition for Declaratory Ruling Under the Telephone Consumer Protection Act*, CG Docket No. 02-278 (May 23, 2018).

[3] *See* 47 C.F.R. § 64.1200.

Inc., 788 F.3d 218 (6th Cir. 2015), and *Physicians Healthsource, Inc. v. Stryker Sales Corp.*, 65 F. Supp. 3d 482 (W.D. Mich. 2014).[4]

As explained below, the Insights Petition radically misconstrues these cases, none of which involved faxes regarding "survey, opinion, and market research studies," as the Petition suggests, and none of which ruled that a fax is an "advertisement" under the TCPA "simply because [it is] sent by a for-profit company," as the Petition suggests.[5] In fact, no court has ever adopted this broad rule. A closer reading of these cases demonstrates that the Insights Petition presents no genuine "controversy" or "uncertainty" for the Commission to resolve, as required by Commission Rule 1.2,[6] and the Commission should deny each of the four declaratory rulings requested in the Petition.

I. The first request for declaratory ruling presents no controversy for the Commission to decide because no court has ever held that a fax is presumptively an "advertisement" simply because it is "sent by a for-profit company."

The Insights Petition seeks a declaratory ruling that faxes are "not presumptively 'advertisements' . . . under the TCPA simply because they are sent by a for-profit company, or might be for an ultimate purpose of improving sales or customer relations."[7] The first request for declaratory ruling raises no "controversy" or "uncertainty" for the Commission to resolve, as required by Commission Rule 1.2, and it should be denied.

Contrary to the claim in the Insights Petition, no court has ever held that a fax is an advertisement "simply because [it is] sent by a for-profit company" or might have an "ultimate

[4] Pet. at 11–17.

[5] *Id.* at 1.

[6] 47 C.F.R. § 1.2.

[7] Pet. at 1.

purpose of improving sales or customer relations." The cases Insights claims are examples of this supposed phenomenon say no such thing.

For example, Insights claims that, "[i]n holding that the invitation was an advertisement" in *Physicians Healthsource, Inc. v. Boehringer Ingelheim Pharms., Inc.*, the Second Circuit applied this rule.[8] That is false.

In *Boehringer*, the fax invited recipients to a "dinner meeting" regarding a particular disease state, and the defendant pharmaceutical company had a drug in the development "pipeline" to treat that disease state.[9] The district court dismissed for failure to state a claim, reasoning "nothing in the fax" itself, the four corners of the document, indicated that the seminar was a "pretext" to advertise the drug.[10] The Second Circuit reversed the dismissal, ruling that "*at the pleading stage*, where it is alleged that a firm sent an unsolicited fax promoting a free seminar discussing a subject that relates to the firm's products or services, there is a plausible conclusion that the fax had the commercial purpose of promoting those products or services."[11] The court held "[t]he defendant can rebut such an inference by showing that it did not or would not advertise its products or services at the seminar, but only after discovery."[12]

On remand in the district court, the parties conducted discovery, and the district court granted the defendant's motion for summary judgment on a fully developed record, holding that the defendant had "rebutted" the presumption with "evidence showing that it did not feature its

[8] Pet. at 13.

[9] 847 F.3d 92, 94 (2d Cir. 2017).

[10] *Id.*

[11] *Id.* at 95.

[12] *Id.*

products or services at the seminar."[13] Contrary to the claim in the Insights Petition that the Second Circuit "h[eld] that the invitation was an advertisement" based on the supposed rule that all faxes sent by a for-profit business are "advertisements," the Second Circuit said no such thing. If it had, the district court could not have granted summary judgment to the defendant on the "advertisement" issue.

Similarly, *Stryker* involved a "free seminar" fax, not a survey fax.[14] The plaintiff argued it was entitled to summary judgment "simply because Defendants are for-profit entities and the seminar was free," and the district court rejected that argument.[15] The court denied both parties' motions for summary judgment, holding that determining whether the seminar was "focused on education or promotion" would have to be decided at trial.[16] The case does not apply the supposed rule that is the basis of the Insights Petition's first request for declaratory ruling, the case has nothing to do with market-research faxes,[17] and the request should be denied as failing to present any controversy or uncertainty for the Commission to resolve.

II. The second request for declaratory ruling regarding "dual-purpose" calls improperly conflates the Commission's rules governing "telemarketing" voice telephone calls with the rules governing whether a fax is an "advertisement."

Insights seeks a declaratory ruling that "the presence in a communication, or some other ancillary document or webpage, of a marginal element that might arguably be considered

[13] *Physicians Healthsource, Inc. v. Boehringer Ingelheim Pharm.*, 2018 WL 1866030, at *5 (D. Conn. Apr. 18, 2018).

[14] 65 F. Supp. 3d at 493.

[15] *Id.*

[16] *Id.*

[17] Insights complains that *Stryker* "fail[ed] to note how inefficient market research is as a vehicle for sales and advertising." (Pet. at 12). There is an excellent reason for that: the faxes at issue in *Stryker* had nothing to do with "market research." They were invitations to a "free seminar."

advertising does not convert the communication into a 'dual-purpose' communication."[18] Insights correctly notes that the "dual-purpose" standard relates to "telemarketing" autodialed/pre-recorded voice telephone calls per the Commission's 2003 Order.[19] Insights then *incorrectly* argues that "additional guidance on the Commission's dual-purpose framework is needed" *in the fax-advertising context* because "the plaintiffs' bar and some courts have begun using a loose interpretation of the Commission's [dual-purpose] guidance to find a second 'purpose' where there is no evidence that such a 'purpose' exists."[20]

As an "example" of this supposed phenomenon, the Petition cites the district court's decision denying a motion to dismiss in *Comprehensive Health Care Sys. of the Palm Beaches, Inc. v. M3 USA Corp.* That decision does not mention the word "purpose," let alone "dual-purpose," and does not rely on the "dual-purpose" ruling in the 2003 Order in any way.[21] That makes sense, since the *M3* case involved faxes, and not voice telephone calls.

Rather, the *M3* case applied the Commission's 2006 ruling that "surveys that serve as a pretext to an advertisement are subject to the TCPA's facsimile advertising rules."[22] Although the Insights Petition mischaracterizes the *M3* decision as holding that "the survey invitations were . . . mere 'pretexts' to advertisements under the relevant FCC rules,"[23] that is mistaken. The *M3* court merely denied the defendant's motion to dismiss for failure to state a claim, holding

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[18] Pet. at 1.

[19] *Id.* at 6 (citing *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd. 14014, 14098, ¶ 141 (rel. July 3, 2003) ("2003 Order")).

[20] *Id.* at 20.

[21] *Comprehensive Health Care Sys. of the Palm Beaches, Inc. v. M3 USA Corp.*, 232 F. Supp. 3d 1239, 1239–43 (S.D. Fla. 2017) ("*M3*").

[22] *M3*, 232 F. Supp. 3d at 1242 (quoting *In re Rules & Regulations Implementing the Tel. Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, Report & Order & Third Order on Reconsideration, 21 FCC Rcd. 3787, 3815, ¶ 54 (Apr. 6, 2006) (hereinafter "2006 Order")).

[23] Pet. at 21.

that "the ultimate question of whether Defendant's survey fax is merely a pretext for advertising its goods or services is a question of fact not suitable for disposition as a matter of law upon a motion to dismiss."[24] The court did not rule that the faxes "were . . . mere 'pretexts,'" as the Insights Petition incorrectly states; it merely ruled that the plaintiff had adequately alleged a pretext to survive a motion to dismiss and obtain discovery.

Similarly, Insights confuses the call rules and fax rules in arguing that the Second Circuit held in *Boehringer* "that a communication may be treated as telemarketing under the TCPA solely on the grounds that the communicating party is, ultimately, out for a profit."[25] *Boehringer* did not deal with the definition of "telemarketing," given that the case involved fax advertisements. The word *telemarketing* does not appear in the opinion.[26] And, as described above, the Second Circuit did not hold the fax was an advertisement; it merely allowed the plaintiff discovery into the allegation that the fax was a pretext to advertising the defendant's drugs at the seminar, a claim the plaintiff ultimately lost at summary judgment.[27]

In sum, the Insights Petition does not ask the Commission to change the rule from the 2006 Order that "surveys that serve as a pretext to an advertisement are subject to the TCPA's facsimile advertising rules."[28] Neither that ruling, nor the *M3* decision, nor *Boehringer*, *Stryker* or any other TCPA fax case has anything to do with the "dual purpose" analysis for voice telephone calls, and there is no reason to grant the declaratory ruling Insights seeks, at least insofar as the Commission's fax-advertising rules are concerned.

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[24] *M3*, 232 F. Supp. 3d at 1242–43.

[25] Pet. at 12–13.

[26] *Boehringer*, 847 F.3d at 92–97.

[27] *Physicians Healthsource v. Boehringer Ingelheim Pharm.*, 2018 WL 1866030, at *5 (D. Conn. Apr. 18, 2018).

[28] Pet. at 22 (quoting 2006 Order ¶ 54).

III. The third request for declaratory ruling regarding "vicarious liability" has nothing to do with the fax-advertising rules.

The Insights Petition seeks a declaratory ruling that "survey, opinion, and market research firms are not subject to the Commission's vicarious liability regime as articulated in *Dish Network*."[29] A+W takes no position on this request as far as it pertains to vicarious liability for autodialed/prerecorded voice telephone calls under *Dish Network*, but A+W opposes this request insofar as it can be read to seek a ruling that would apply in the fax-advertising context.

As the Commission explained in its amicus brief to the Eleventh Circuit in *Palm Beach Golf Ctr.-Boca, Inc. v. John G. Sarris, D.D.S.*, 781 F.3d 1245, 1255 (11th Cir. 2015), and as the Eleventh Circuit accepted, "[s]eparate subsections of the statute address voice telephone calls and facsimile advertisements" and "FCC rules implementing those provisions treat voice calls and faxes differently."[30] The Commission stated that "under the plain text" of the Commission's definition of "sender,"[31] "direct liability for sending an unsolicited facsimile advertisement attaches to the entity (defined as the 'sender') whose goods or services are being promoted, and *not* generally to the entity that physically transmits the facsimile."[32] The Commission emphasized that the fax "sender" is "directly" liable, and the *Dish Network* analysis for "seller" liability in the call context has no application in fax cases.[33] The courts that have applied Rule

[29] *Id.* at 1.

[30] *Palm Beach Golf Center-Boca, Inc. v. Sarris*, Commission Letter Brief, 2014 WL 3962595, at *2 (11th Cir. July 17, 2014).

[31] 47 C.F.R. § 64.1200(f)(10).

[32] Commission Letter Brief, 2014 WL 3962595, at *3–7.

[33] *Id.*

64.1200(f)(10) in private TCPA litigation have applied "direct liability" for the sender, with no "vicarious liability" analysis.[34]

Thus, to the extent the third request for declaratory ruling in the Insights Petition can be read to request a ruling that "vicarious liability" under *Dish Network* does not apply to market researchers who send advertisements *by facsimile*—as opposed to those who make autodialed/prerecorded voice telephone calls—the request is nonsensical and should be denied.

IV. The fourth request for declaratory ruling presents no controversy or uncertainty in the fax-advertising context.

The Insights Petition seeks a declaratory ruling that "survey, opinion, and market research studies do not constitute goods or services *vis-à-vis* the respondent (the participant in a research study), and are not transformed into goods or services merely because they include some nominal inducement to participate."[35] This request raises no "controversy" or "uncertainty" for the Commission to resolve under Commission Rule 1.2 because none of the cases the Petition cobbles together has ever ruled (1) that a research study is a "good or service" *vis-à-vis* the fax recipient; or (2) that a research study is "transformed" into a good or service if a fax offers "nominal inducement to participate."

Boehringer and *Stryker* dealt with "free seminar" faxes, a circumstance governed by the 2006 Order, primarily Paragraph 52.[36] *Medco* involved a fax informing pharmacies of which medications were on a "formulary" maintained by a pharmacy-benefits manager.[37] In none of these cases did the faxes at issue have anything to do with market research.

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[34] *See, e.g.*, *Imhoff Inv., LLC v. Alfoccino, Inc.*, 792 F.3d 627, 635–37 (6th Cir. 2015) (holding defendant who hired fax broadcaster to send faxes advertising its restaurant was "directly liable").

[35] Pet. at 1.

[36] *Boehringer*, 847 F.3d at 94; *Stryker*, 65 F. Supp. 3d at 493.

[37] *Medco*, 788 F.3d at 220.

M3 involved a market-research fax, which the plaintiff alleged was a "pretext" under the Commission's rule that "surveys that serve as a pretext to an advertisement are subject to the TCPA's facsimile advertising rules."[38] But the case did not hold (1) that a research study is a "good or service" *vis-à-vis* the fax recipient; or (2) that a research study is "transformed" into a good or service if a fax offers "nominal inducement to participate," the ostensible subject of the fourth request for declaratory ruling in the Insights Petition. As described above, the case simply ruled that the plaintiff adequately alleged the fax was a pretext to further advertising under the "pretext" rule for survey faxes announced in the 2006 Order, a rule the Insights Petition does not ask the Commission to change.

In the only other case involving a "survey" fax cited in the Insights Petition, *Phillips Randolph Enterprises, LLC v. Adler-Weiner Research Chicago, Inc.*, the court granted the defendant's motion to dismiss for failure to state a claim, holding the plaintiff "[did] not allege that the fax was a pretext to an advertisement."[39] It plainly did not apply either of the supposed rules the Insights Petition asks the Commission to reject in the fourth request for declaratory ruling, and the request should be denied.

Conclusion

Insofar as the Insights Petition seeks a declaratory ruling that would apply in the fax-advertising context, it presents no "controversy" or "uncertainty" for the Commission to resolve, and it should be denied.

[38] 2006 Order ¶ 52.

[39] 526 F. Supp. 2d 851, 853 (N.D. Ill. 2007).

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Respectfully submitted,

By: s/Glenn L. Hara

Anderson + Wanca
3701 Algonquin Road, Suite 500
Rolling Meadows, IL 60008
Telephone: (847) 368-1500
ghara@andersonwanca.com